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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1411

REBA LUNOW,
Petitioner,

vs.

FAIRCHANCE LUMBER COMPANY, A CORPORATION; ROCKWELL-STANDARD CORPORATION, A CORPORATION; UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION; ALLEN & HOSHALL, A CO-PARTNERSHIP, Composed of Lorin B. Allen and Robert H. Hoshall,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

Petitioner, Reba Lunow, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on February 9, 1968, affirming the trial court's judgment sustaining the respondents' motion to dismiss the Petitioner's complaint. No petition for rehearing was filed. A motion to stay the mandate has been granted.

OPINIONS BELOW

The judgment of the trial court is not officially reported and is printed in the Appendix A to this petition. The opinion of the Court of Appeals is not yet officially reported and is printed in Appendix B to this petition.

JURISDICTION

Jurisdiction of this court is invoked under Title 28, U.S.C.A., Section 1254 (1).

The denial of the constitutional guarantees of the Fifth and Fourteenth Amendments were raised in the Complaint in the Trial Court, and in the Court of Appeals.

FEDERAL STATUTE INVOLVED

Title 42, U.S.C., Sec. 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

OKLAHOMA STATUTES INVOLVED

Title 32, O.S.A., Section 1.

Mutual Obligations.

Husband and wife contract towards each other obligations of mutual respect, fidelity and support.

Title 32, O.S.A., Section 3.

Duty to Support.

The husband must support himself and his wife out of the community property or out of his separate property or by his labor. The wife must support the husband when he has not deserted her out of the community property or out of her separate property when he has no community or separate property and he is unable from infirmity to support himself.

Title 32, O.S.A., Section 4.

Separate Property.

Except as mentioned in the preceding section 1, neither husband nor wife has any interest in the separate property of the other, but neither can be excluded from the other's dwelling.

Title 32, O.S.A. Section 15.

Rights of Married Women.

Women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone. Provided that this Chapter shall not confer upon the wife a right to vote or hold office, except as is otherwise provided by law.

CONSTITUTION OF OKLAHOMA

Article 2, Section 7:

> "No person shall be deprived of * * * property, without due process of law."

Article 4, Section 1:

> "The powers of the government of the State of Oklahoma shall be divided in three separate departments; The legislative, executive, and judicial; * * * and neither shall exercise the powers belonging to either of the others * * *."

CONSTITUTION OF THE UNITED STATES

Fifth Amendment:

> "* * * No person shall be deprived of life, liberty or property without due process of law."

Fourteenth Amendment:

> "Section 1. * * * Nor shall any state—deny to any person within its jurisdiction equal protection of the laws."

QUESTIONS PRESENTED

1. The decision of the Trial Court and the Court of Appeals based on the decision of the Supreme Court of Oklahoma are violative of the Constitutional rights of Petitioner, Reba Lunow guaranteed to her by the 5th and 14th Amendments.

a. The denial of the right of a married woman to an action for her damages and loss of consortium due to crippling personal injuries to her husband, caused by the negligent acts of third parties, where the same right is

granted to a man, is a denial of the equal protection of the law.

b. The denial of the petitioner's right to an action for loss of consortium where the same right is granted to a man constitutes a denial of due process of law as to the wife.

2. The decision of the Court of Appeal and United States District Court denies the petitioner her constitutional right to equal protection and due process of law and constitutes an unreasonable and invidious discrimination.

STATEMENT OF THE CASE

The complaint was filed on March 25, 1966 by Reba Lunow, wife of William Henry (Bill) Lunow, an incompetent, to recover her damages for loss of consortium and for breach of and interference with her marriage contract, when her husband of twenty-five years was permanently and totally disabled from injuries caused by the gross negligence of the Respondents.

William Henry (Bill) Lunow was employed by Western Steel Erectors and was working on the roof of the building of respondent, Rockwell-Standard in Oklahoma County which was being constructed by Respondent, Fairchance Lumber Company. Respondent, United States Fidelity and Guaranty had insurance contracts on other respondents and had the right of safety inspections and had made some inspections. Respondents, Allen and Hoshall were the architects. They were independent contractors and not agents of employer.

The complaint and amendment allege the destruction by Respondents of the marriage contract of Petitioner and her husband by injuring him, the denial of her constitu-

tional right to equal protection of the laws and her right to sue for damages. There is no statute granting the husband the right to sue for loss of consortium of his wife and no statute denying that right to the wife.

REASONS FOR GRANTING THE WRIT

1. Granting right of action for loss of consortium to a husband and withholding it from the wife, by opinion of the Supreme Court of Oklahoma in *Howard* v. *Verdigris Valley Electric*, 207 P.2d 784, constitutes a denial of the constitutional guarantees of equal protection and due process amendments to the constitution.

2. The denial of Petitioner's right to an action for loss of consortium where the same right is granted to a man constitutes an unwarranted and invidious discrimination.

3. The Court of Appeals, Tenth Circuit affirmed the Trial Court's decision dismissing this case, however, did so on ground and for a reason not decided or passed upon by the Trial Court. Two different reasons have been given for dismissing the Petitioner's complaint.

(a) The Trial Court dismissed the complaint for the reason the denial of a right to an action for loss of consortium by a wife does not violate the constitutional guarantees.

(b) The Court of Appeals Tenth Circuit affirmed the trial court on the grounds the Workmen's Compensation Act of Oklahoma spreads the umbrella of immunity over all of the Respondents, and refused to decide the constitutional questions.

4. The Court of Appeals has decided a procedural question which is in conflict with the decisions of this

court, to-wit, The Court of Appeals has decided that on a motion to dismiss the court may determine without benefit of affidavits or depositions the relationship between parties, that is, whether or not the relationship of agency or independent contractor exists. That such a decision is a denial of due process of law and deprives a party of the right to a trial by jury.

BRIEF OF AUTHORITIES AND ARGUMENT

1. Granting a right of action for loss of consortium to a husband, but withholding it from the wife, by opinion of the Supreme Court of Oklahoma in Howard v. Verdigris Valley Electric, 207 P.2d 784, constitutes a denial of the constitutional guarantees of equal protection and due process amendments to the constitution.

Loss of consortium is a cause of action which may be validly maintained by a wife when her husband is negligently injured by defendant.

We realize that recent cases are in conflict with the present law of the State of Oklahoma. These cases are cited for two specific reasons:

1. To show the recent trend in the law; and,
2. To show that courts have refused the continued denial of recovery to the wife as unfair and not being supported in reason or fact, a reason which in our opinion is far less valid than one based on denial of constitutional guarantees.

Title 32, O.S.A., Section 15 confers on the wife the right to sue for injury to her property. A wife can sue on the basis of destruction and interference with her marriage contract. Petitioner should be granted the right to be heard and present this case to the Court.

In Oklahoma each spouse has separate and equal interest in all the rights and privileges which emanate from the marriage contract—in the consortium of his or her spouse. There is no logical reason why each spouse should not have an equal and independent cause of action for loss of consortium through negligence, *Carey* v. *Foster*, 345 F.2d 772, C.A. 4th, 1965.

There should be no distinction in Oklahoma between an action based on negligence and those brought for alienation of affections. The injury sustained by the wife is the same—it matters not whether it was intentional or through negligence.

In Oklahoma, women (wives) may sue and recover for alienation of affections, slander, libel, damages caused by any act, may vote, hold public office, and have any other right or protection their husbands have, except the Supreme Court of Oklahoma held that a wife could not sue for loss of consortium of her husband. This is judge-made law that conflicts with Title 32, O.S.A., Section 15 and the Amendments of the Constitution of the United States and denies due process and equal protection of the laws to women because they are women. 1

In *Moore* v. *Moore*, 158 Pac. 578, the Oklahoma Court held:

> "Under the laws of Oklahoma, a woman, though married, retains her legal existence and personality, and may sue in the courts in her own name for the protection or redress of injury sustained to her reputation, person, property, or natural rights, the same as a man can do."

based upon *Fiedeer* v. *Fiedeer*, 140 Pac. 1022, wherein the Supreme Court of Oklahoma held:

1. An additional reason for reviewing the decision is based upon the fact that in Oklahoma and 37 other states, a wife would be entitled to a divorce upon the grounds of arbitrary refusal of consortium under mental or physical cruelty portion of the divorce statute. See 12 Okla.Stat. Ann. 1271

> "It is the policy of our Constitution and statutes to open the doors of the courts of justice to every person without distinction or discrimination for redress of wrongs and reparation for injuries; and, under our Constitution and statutes, a married woman may maintain an action for injuries to either her natural or statutory rights the same as though she were a feme sole * * *."

The answer to the assertion that no statute gives a wife a cause of action, is that while it may be conceded that the Emancipation Statute does not grant the wife a new cause of action it does not prevent the wife from having a legal protected interest. In allowing a wife to recover for a negligent wrong inflicted by her husband, the Oklahoma Court in *Courtney* v. *Courtney*, 184 Okla. 395, 400, 87 P.2d 660, 665 (1938) said:

> "It is our view that by reason of the statutes just mentioned, it was unnecessary for the legislature by section 1665, O.S. 1931 (32 Okl. Stat. 815 (1941)), to allow the wife a cause of action in express terms—she, like all ordinary persons, had already been granted that by our Constitution and previous statutes. It was necessary only to free the married woman of her procedural disability in order that she might exercise the natural rights of an ordinary person. . . ."

At page 666 the court continues:

> "Other evidence of the aim to free married women from their common law disabilities and to give effect to the modern and more enlightened conception of the marriage status is found in the fact that in this state as in North Dakota from whence came our married women's statutes, a wife is not under the legal disabilities still obtaining in many of the states whose courts adhere to the majority view." The opinion continues with quotes from *Helvie* v. *Hoover*, 11 Okla. 687, 69 Pac. 958.

If the wife has all the rights of an ordinary person then she had the substantive right to her husband's consortium. It is immaterial whether the State of Oklahoma has acted solely through its judicial branch, since, whether legislative or judicial, it is still the application of the state power which must be scrutinized to determine the violation of constitutional rights. *NAACP* v. *Alabama*, 377 U.S. 288, 12 L.Ed.2d 325, 84 S.Ct. 1302.

The Petitioner is not asserting a new right. The recovery in the husband's instance and not in the wife's is a violation of her rights under the Oklahoma statutes and the 5th and 14th Amendments to the Constitution.

2. The denial of Petitioner's right to an action for loss of consortium where the same right is granted to a man constitutes an unwarranted and invidious discrimination.

The rights which the Petitioner is asserting in this action are entirely separate from the grounds of recovery asserted by the husband in his action against the Respondents. Just as in the husband's action for loss of consortium, the wife cannot recover for any damages for which the husband might have recovered (or his personal representative in the case of wrongful death); she can recover for those injuries which were sustained by her, and being personal to her, for which the husband could not have recovered in his action. Admitted that the injury is one that is difficult to measure in pecuniary terms, it undoubtedly is a real injury, and can certainly be as accurately measured as the injuries in a case where the husband is suing for loss of consortium. The reasoning, that the husband has already recovered, is based upon the false idea that loss of services is the only or main element of consortium. Moreover, it is argued that since the husband has already recovered damages for his being un-

able to support the wife, then she has no cause of action for the so-called sentimental elements of consortium. Oklahoma, however, allows recovery for injury to the sentimental elements of consortium alone. Oklahoma has adopted the following definition of loss of consortium: "Loss by either husband or wife of rights to the person, affection, society, assistance, aid, fellowship, companionship, cooperation, or comfort of the other constitutes a loss of consortium." *Overton* v. *Overton*, 246 Pac. 1095, 1907 (1926).

Let us view the marital rights of which the Petitioner was deprived and for which she may recover damages. From the definition of "consortium" heretofore adopted, these rights are personal and mental, including the society, the affection, and the companionship of the husband. The other, financial, including the right to be maintained and supported during her life in accordance with her rank and station, the right of co-operation, the right of assistance. These elements constitute more or less of a concrete and exact division of the whole that may be ascertained from facts and figures. Upon these elements there is a large measure of discretion with the jury.

When a comparable set of facts was submitted to the Federal District Court in *Owens* v. *Illinois Baking Co.*, 260 F.Supp. 820 (Mich. 1966), there the constitutional right prevailed. The State law was held to be unconstitutional and in violation of equal rights and due process.

In *Manning* v. *Jones*, (C.A. 8th, 1965) 349 F.2d 992, was a wife's action for loss of consortium resulting from injuries to her husband by negligence of defendant. Judgment was rendered for the plaintiff and defendant appealed; affirmed. Undisputed findings that physical

condition of plaintiff's husband resulted in his complete disability to engage in conjugal relations with his wife or be of comfort to her and left her with life devoid of all normal conjugal relations and otherwise barren of normal living, sufficed as basis for judgment awarding damages to plaintiff for loss of her separate right of consortium growing out of marriage contract. At page 996 the Court continued:

> "Defendant's counsel frankly conceded at oral argument that deprivation of sexual relations alone would suffice to justify the amount awarded." ($15,000.00).

The wife has a separate and independent right of action for loss of consortium for negligent injuries. *Sove* v. *Smith,* (C.A. 6th, 1962) 311 F.2d 5 (Reversing lower court); *Wright* v. *Schebler Co.,* 37 F.R.D. 319; *Dutton* v. *Hagletower,* 214 F.Supp. 298; *Karczewski* v. *Baltimore and Ohio Railroad Company,* 274 F.Supp. 169 (1967).

In *Montgomery* v. *Stephan,* 101 N.W.2d 227 (1960), plaintiff's husband suffered severe and permanent physical and mental injuries from an automobile collision caused by defendant's alleged negligence. In her declaration plaintiff sought a recovery for the loss of her husband's consortium caused by the collision. She asserted that she had been "deprived of her husband's society and comfort, of his aid and companionship and of normal conjugal affection." The trial court granted defendant's motion for dismissal of the declaration on the ground that a wife may not recover for loss of consortium caused by negligence.

On appeal, held, reversed and remanded. The court rejected the applicability of the overwhelming precedent on the grounds that they were "out of harmony with the

conditions of modern society" and constitutional provisions which have placed the wife of today on a legal par with her husband. Justice Talbot Smith in referring to a wife's cause of action for consortium stated (235):

> "The reasons for the old rule no longer obtaining, the rule falls with it. The obstacles to the wife's action were judge-invented, and they are herewith judge-destroyed."

The point considered is, that to apply what appears to be the present Oklahoma law, which gives the husband a cause of action for loss of consortium, but denies the same right to the wife, would deprive the wife of the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides:

> "Nor shall any state * * * deny to any person within its jurisdiction equal protection of the laws."

It is settled that the equal protection clause of the Fourteenth Amendment operates fully to include women within its protective scope. Discriminations against women as such are invalid. 16 Am.Jur.2d, Sec. 514, at page 899, citing *Carrithers* v. *Shelbyville*, 126 Ky. 769, 104 S.W. 744; *State ex rel. Wells* v. *Walker*, 326 Mo. 1233, 34 S.W.2d 124; and *Re Opinion of the Justices*, 303 Mass. 631, 22 N.E.2d 49, 123 A.L.R. 199.

That the equal protection clause affords comfort to women and this was made clear in the case of *Goesaert* v. *Cleary*, 335 U.S. 464, 69 S.Ct. 198, decided in the Supreme Court of the United States in 1948. As a part of the Michigan system for controlling the sale of liquor, bartenders are required to be licensed, but no female may be so licensed unless she be "the wife or daughter of the male owner," of a licensed liquor establishment. It was

argued that the classification as made by the Michigan statute deprived women of the equal protection of the laws as guaranteed by the Fourteenth Amendment. Justice Felix Frankfurter, writing for the majority of the Court, said at page 466:

> "* * * Michigan cannot play favorites among women without rhyme or reason. The Constitution in enjoining the equal protection of the laws upon states precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations which are different in fact or opinion to be treated in law as though they were the same."

No rational basis may be found for the distinction made by Oklahoma case law which is applied so as to give the husband a cause of action for the loss of consortium and at the same time deny an equivalent right to the wife. The inability of the wife to sue for a loss of consortium results not from the absence of a right, but from the previous state case law, in which the constitutional issue was not raised, nor mentioned, nor passed on. Yet Oklahoma courts held women are eligible to be jurors and that the word "men" in Sections 18 and 19 of Article 2 of the Constitution of Oklahoma included "women." See *In re House Bill No. 145*, in 237 P.2d 624 (Okla. 1951).

The Congress enacted the Civil Rights Act prohibiting discrimination between men and women in employment.

There has been a steady trend on the part of the courts of various states to recognize that the wife does have an action for loss of consortium because there is no longer any rational basis for granting the right to the husband and denying it to the wife. Many of these courts

have reached this position specifically on the basis that continued denial of recovery to the wife is unfair and cannot be supported in reason or fact.

Under the doctrine of *Erie* v. *Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, Federal Courts must follow the substantive law of the states in diversity cases, but where a Federal question is presented, the court looks to Federal law as interpreted by the United States Supreme Court.

When you look to Federal law, you find from *Hitaffer* v. *Argonne*, (D.C.) 183 F.2d 811, on down each time the Federal Courts have passed on this question of wife's right to sue for loss of consortium (when husband has the right also to sue) they have sustained the right of the wife also to sue.

The trial court applied the law of the forum even though it is in conflict with the Constitution and in addition was a tort for damages to the marriage contract of Petitioner.

In *Owens* v. *Illinois Baking Co.*, 260 F.Supp. 820 (Feb. 7, 1966, Mich.):

> "Denying wife right to sue for loss of consortium where right is granted to husband is violation of her right of equal protection of law under the 14th Amendment."

The Supreme Court has frequently sustained District Court jurisdiction under 28 U.S.C., Sec. 1343 (3) or its predecessors to entertain suits to redress deprivations of right secured against state infringement by the equal protection and due process clauses of the Fourteenth Amendment. *Douglas* v. *Jeannette*, 319 U.S. 157, 87 L.Ed. 1324, 63 S.Ct. 877.

The constitutional protection from discrimination which is violative of due process under the Fifth and Fourteenth Amendments, has not been raised by the litigants or passed upon by the courts, in the cited Oklahoma cases. This is a strong constitutional point raised in the Lunow case; where it has been raised, the Federal court has held that to deprive a wife of her right to recover for loss of consortium is unconstitutional. The Constitution has been to one generation a means of cementing the Union, to another a protectorate of burgeoning property, and to another a safeguard of basic human rights and equality before the law.

In *Criqui* v. *Blaw-Knox,* (10th 1963), 318 F.2d 811, this Court of Appeals' interpretation of the Kansas law did not pass on the denial of constitutional guarantees under the Fifth and Fourteenth Amendments because the Federal question was not alleged, presented, argued or involved in that case. The Federal Court has the power and duty to enforce basic civil constitutional rights which State courts are reluctant to protect and in recent years has pioneered in this area.

Law is not static, but is endowed with vitality and a capacity to grow. It never becomes permanently crystallized but changes and adjusts from time to time to new developments in social and economic life to meet the changing needs of a complex society.

Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the Federal judicial power defined in Article 3, Sec. 2 and so within the power of Congress to assign to the jurisdiction of District Courts. Congress has exercised that power in Title 28, U.S.C., Sec. 1343(3):

> "The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person * * * to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States * * *."

Title 42, U.S.C., Sec. 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

This section grants separate and distinct rights of action for denial of due process of law of equal protection of the law. *McShane* v. *Moldovan*, 172 F.2d 1016 (6th C.A.); *Ortega* v. *Ragen*, 216 F.2d 561 (7th C.A.), *cert. denied* 349 U.S. 940.

It is aptly stated in the case of *Clem* v. *Brown*, 207 N.E.2d 398 (Ohio), to recognize a husband's right to recover for loss of consortium without giving a wife an equivalent right to recover for negligent impairment of husband's consortium would be an unconstitutional denial to a wife of "equal protection of law."

Wives should have the same rights as husbands both under Oklahoma law and the same right not to be discriminated against under the Amendments to the Constitution of the United States.

The difficulty in asserting women's rights lies not in the limited reach of the Fourteenth Amendment, but in

the failure of the courts to isolate and analyze the discriminatory aspect of differential treatment based on sex.

Law, like society, is best judged by how it deals not with the strong but with the weak. The greatness of American justice is measured not by our commercial law, but by the extent to which legal aid has put justice within the reach of the poor and defenseless * * *.

The genius of the American Constitution is its capacity, through judicial interpretation, for growth and adaptation to changing conditions and human values. Courts have not yet fully realized that women's rights are a part of human rights; but the climate appears favorable to renewed judicial attacks on sex discrimination.

In *Novak* v. *K. C. Transit Co.*, 365 S.W.2d 539, Missouri has perhaps best exemplified the wife's loss in the following statement (quoting from another opinion):

> "The difficulty . . . is their failure to distinguish the injured husband's personal loss from the separate, distinct and legally recognized loss suffered by his wife. Take the case of a husband who suffers an incapacitating injury to his reproductive organs. In his personal injury suit it is clear that his damages are predicated upon *his* physical injury which precludes him from copulation, procreation, and an otherwise full enjoyment of his marital state. However, the wife's loss is just as real as it is distinct. She can no longer enjoy *her* legally sanctioned and morally proper privilege of copulation or procreation, and is otherwise deprived of *her rights,* not his."

Missouri courts feel that the problem of double recovery can be avoided by simple mathematics. This is done by delineating, accurately, the items properly includable in the husband's damages, then allowing a separate action by the wife in which she is permitted to

recover for the loss of only those elements of consortium which, under the facts of the particular case, represent separate and distinct losses to her.

It has been an uphill struggle for the married woman but there appears to be a definite trend in American courts which favors the wife's right to maintain an action for the loss of consortium when the husband's injury is the result of a stranger's negligent act. Those opposing this view now appear to have recognized that there is some injustice in their decisions.

The Oklahoma case law rule which held that a wife may not recover for the loss of consortium of her husband deprives the wife of her equal protection of the law, as provided in the 5th and 14th Amendments to the United States Constitution and constitutes an invidious discrimination. There can be no question that the judiciary has taken giant strides in the last two decades to insure the legal equality of all persons. The Congress has stressed this in the recent enactment of the Civil Rights Law. The law is changing, society is changing, and antiquated distinctions in both criminal and civil law which have for so many years deprived citizens of these constitutionally guaranteed equalities have fallen. The Respondents rely on the common law rights of women, when the wife was little more than a chattel. Any married man would be the first to admit that this condition no longer exists.

The interpretation by the trial court of the Oklahoma decisions denying the wife these rights is based on the theory that the wife had no action for loss of consortium at common law and that she can have no such right of action unless specifically conferred by statute. There is no Oklahoma statute authorizing the husband's right to sue. The right grows out of the marriage relation.

3. The Court of Appeals, Tenth Circuit, affirmed that Trial Court's decision dismissing this case, however, did so on ground and for a reason not decided or passed upon by the Trial Court. Two different reasons have been given for dismissing the Petitioner's complaint.

(a) The Trial Court dismissed the complaint for the reason the denial of a right to an action for loss of consortium by a wife does not violate the constitutional guarantees.

(b) The Court of Appeals, Tenth Circuit, affirmed the Trial Court on the grounds the Workman's Compensation Act of Oklahoma spreads the umbrella of immunity over all of the Respondents.

Matters not appearing in the record will not be considered by the Court of Appeals. *Brooks* v. *Woods*, (C.A. 9th) 181 F.2d 716; *McCullough Tool Co.* v. *Well Surveys, Inc.*, (C.A. 10) 1965, 343 F.2d 381, cert denied.

The Respondents are bound by the decision of the trial court, and reviewing court will refuse to consider question which is raised for the first time on appeal and was never presented to or passed upon by the trial court..

Petitioner and Respondents are bound by theories passed upon by the trial court and other theories cannot be raised or argued in the Court of Appeals if not passed upon by the trial court. *Gilby* v. *Travelers Ins. Co.*, (C.A. 8) 248 F.2d 794.

In the Lunow case the trial court in passing upon the motions to dismiss did not decide the "workman's compensation" question and the only legal question before this court is the constitutional question.

This case presents serious constitutional questions which in our opinion should be decided by this court. Many states have granted a wife the right to an action

for loss of consortium for negligent injuries to the husband. Several states including the District of Columbia have held that where Workman's Compensation Law or similar legislation applies assuming the woman has the right to an action for a loss of consortium such laws constitute an exclusive remedy against persons covered by the law, *Smithers and Co.* v. *Coles*, 242 F.2d 220.

In the case of *Hitaffer* v. *Argonne Co.*, 183 F.2d 811, the Court of Appeals in the District of Columbia decided this question in favor of the woman and this court denied certiorari. And in the latter case of *Smithers and Company, Inc.* v. *Coles*, 242 F.2d 220, same circuit, that court expressly overruled its prior decision in *Hitaffer* v. *Argonne*, supra. We respectfully submit that the constitutional questions involved regarding the right of a woman to sue for loss of consortium and whether or not the Workman's Compensation Law is exclusive as against persons covered by the act should be considered by this Court. All of the 50 states have Workman's Compensation Laws or similar legislation.

The Oklahoma Workman's Compensation Act was passed at a time when an action for loss of consortium was not granted to a woman for negligent injuries by third persons to her spouse. The Oklahoma Workman's Compensation has abrogated certain rights of the employee. The Court of Appeals, Tenth Circuit, has decided that even if the Petitioner has a right to an action for loss of consortium the Workman's Compensation Law of Oklahoma has abrogated this right. This we say is error.

The Oklahoma Supreme Court has consistently held that the purpose of the Oklahoma Compensation Law, Title 85, O.S.A., Section 1 et seq., is to compensate the injured person for loss of earning power from inability to

work and for a disability resulting in a loss of wage earning capacity. *U. S. Casualty Co. v. Steiger*, 66 P.2d 55; *Van Orman* v. *Robinson*, 300 Pac. 412.

This case presents two constitutional questions to this court which should be decided:

a. Is it a violation of constitutional guarantees to deprive a woman of an action for loss of consortium for injuries to her husband where the same right is granted to a man for injuries to his wife?

b. Assuming the woman has a right to an action for loss of consortium has the Court of Appeals, Tenth Circuit, denied the Petitioner her constitutional rights by holding in this case the Workman's Compensation Law abrogates a right to loss of consortium where by construction the compensation granted by the act is solely for loss of earning capacity?

4. The Court of Appeals has decided a procedural question which is in conflict with the decisions of this Court, to-wit, the Court of Appeals has decided that on a motion to dismiss the Court may determine without benefit of affidavits or depositions the relationship, between parties, that is, whether or not the relationship of agency or independent contractor exists. That such a decision is a denial of due process of law and deprives a party of the right to a trial by jury.

The Court of Appeals in its zeal to determine this case on grounds other than the constitutional question has committed error. The Court of Appeals in its opinion determined that Allen & Hoshall were the agents of Rockwell-Standard and therefore enjoyed the same immunity granted to Rockwell-Standard by Oklahoma Workman's Compensation Act. The procedural aspects of this case must be kept in mind, i.e., the case was before the Court

of Appeals from the trial court's order sustaining the respondents' motions to dismiss. In the complaint, the Petitioner states a claim against Allen & Hoshall engineers on grounds of negligence.

The Court of Appeals, Tenth Circuit, only had before it a motion to dismiss with several stipulations and proceeded to determine as a matter of law that Allen & Hoshall were the agents of Rockwell-Standard and therefore the doctrine of respondeat superior applied. This we say was error because the question of agency or independent contractor cannot be determined from the record in this case. The better rule is that if a constitutional question may be decided on facts (agency or independent contractor) then a motion to dismiss should be overruled; *Gibbs* v. *Buck*, 59 S.Ct. 725, 307 U.S. 66, 83 L.Ed. 1111. The action of the Court of Appeals is patently erroneous because it deprives a litigant of the right of trial by jury. *Simler* v. *Conner*, 83 S.Ct. 609 372 U.S. 221, 9 L.Ed.2d 691. It was a contract between Allen & Hoshall and Rockwell-Standard. This contract was made by Rockwell-Standard and Allen & Hoshall was either an independent contractor in its relation to Rockwell-Standard or was an agent, servant or employee of Rockwell-Standard. This is a question of fact at least until such time as the court with the facts before it determines as a matter of law that the relationship is one or the other.

There are no facts, depositions, interrogatories affidavits or statements in pleadings from which the Court of Appeals could ascertain as a matter of law the legal relationship between Allen & Hoshall and Rockwell-Standard Corporation—*Carss* v. *Outboard Marine Corp.*, (C.A. 5th, 1958) 252 F.2d 590. The concept of the Federal Rules dictates that pleadings are to facilitate a proper

decision on the merits and not provide a vehicle to deny a litigant his day in Court. *Conley* v. *Gibson*, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REBA LUNOW,

Plaintiff,

vs.

FAIRCHANCE LUMBER COMPANY, a corporation; ROCKWELL-STANDARD CORPORATION, a corporation; UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation; ALLEN & HOSHALL, a co-partnership composed of Lorin B. Allen and Robert H. Hoshall,

Defendants.

No. 66-122 Civil

Memorandum Opinion

(Filed February 24, 1967)

The plaintiff Reba Lunow seeks recovery herein against the defendants for loss of consortium claimed to have been sustained by her by reason of physical injuries received by her husband, William Henry Lunow, in an accident suffered in Oklahoma and alleged to have been caused by various acts of negligence on the part of the several defendants. The plaintiff asserts that Oklahoma gives the husband a cause of action for loss of his wife's consortium under these circumstances and, therefore, Oklahoma cannot constitutionally deprive the wife of a cause of action for loss of her husband's consortium by reason of the Fifth (due process) and Fourteenth (equal protection of the laws) Amendments to the United States Constitution.

The defendants resist the action of the plaintiff alleging that no cause of action exists in Oklahoma in favor of a wife for loss of consortium and, in addition, the Oklahoma Workmen's Compensation Law (Title 85, Oklahoma Statutes, Sections 11 and 12) makes its benefits exclusive and in place of all other liability that might otherwise accrue to the employee, William Henry Lunow, and the plaintiff as his spouse.

The Court has jurisdiction based on diversity of citizenship and the involvement of the required jurisdictional amount. 28 United States Code 1332.

All defendants have filed Motions to Dismiss the Complaint herein claiming that it fails to state a claim upon which relief can be granted and some defendants additionally assert that this Court has no jurisdiction of the subject matter of this action. The parties have filed Stipulations herein setting out the relationships existing between all parties. The issues presented as to whether the plaintiff has a cause of action herein for loss of consortium and the effect of the provisions of the Oklahoma Workmen's Compensation Law on the subject matter of this litigation have been exhaustively briefed and orally argued to the Court.

The undisputed facts in this case are that the husband of the plaintiff, William Henry Lunow, was an employee of Western Steel Erection Company (not a party herein). Western Steel Erection Company (Western) was a subcontractor of the defendant Fairchance Lumber Company (Fairchance) who was the prime contractor constructing a building at Bethany, Oklahoma for the defendant Rockwell-Standard Corporation (Rockwell), the owner. The defendant Rockwell is in the airplane manufacturing business and the building was an addition to

its plant at the above location. The defendant United States Fidelity and Guaranty Company (USF&G) carried workmen's compensation insurance for the defendant Fairchance. This insurance was required by Rockwell in its contract with Fairchance and the cost thereof was paid by Rockwell under its cost plus arrangement with Fairchance for construction of the building. Under the terms of the USF&G workmen's compensation insurance policy the carrier was permitted to inspect the workplaces or the building being constructed by Fairchance. The defendant Allen & Hoshall was the engineer-architect on the project being engaged in this capacity by Rockwell. On October 26, 1964, William Henry Lunow, as an employee of Western, accidently fell from the roof of the said building being constructed and sustained serious and permanent injuries. William Henry Lunow proceeded against his immediate employer Western and its workmen's compensation insurance carrier (not a party herein) in the Oklahoma State Industrial Court by filing a claim for compensation in said Court under the Oklahoma Workmen's Compensation Law regarding his October 26, 1964, accident and resulting injuries. Mr. Lunow is receiving certain benefits under this proceeding.

In this diversity action the substantive law of Oklahoma must be applied unless such application impairs a right conferred or is in conflict with any inhibitions imposed by the Constitution and laws of the United States. *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Erwin* v. *Barrow*, (Tenth Cir.-1954) 217 F.2d 522.

The Oklahoma Supreme Court in *Howard* v. *Verdigris Valley Electric Co-op*, 207 P.2d 784 (1949) and *Nelson* v. *Lockett & Co.*, 243 P.2d 719 (1952), has held that a wife

in Oklahoma has no cause of action for loss of consortium. The United States Court of Appeals for the Tenth Circuit in a case under Kansas law has held that a wife has no cause of action for loss of consortium. *Criqui* v. *Blaw-Knox Corp.*, (Tenth Cir.-1963) 318 F.2d 811. A Motion to Dismiss was sustained and affirmed in this case. Each of these three cases clearly considers the matter of granting a wife a cause of action for loss of consortium as being legislative in nature and not judicial. The Oklahoma Supreme Court in the Howard case, supra, also held that the several Oklahoma women's emancipation statutes did not create in the wife a cause of action for loss of consortium.[1] And there is respectable authority that to give the wife such a cause of action is to permit a double recovery for husband and wife for the same injury.[2]

The Oklahoma holding and the Tenth Circuit holding in the Kansas case, as aforesaid, conforms with the weight

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1. This case holds:

"* * * The underlying principle to be noted in all the cases is that whatever additional rights may have been extended to women generally under the so-called emancipation statutes, or married women's acts, such statutes do not confer a new right upon the wife which permits recovery for loss allegedly resulting from negligent injuries to her husband, since no new cause of action was created thereby.

Statutory emancipation of married women, which gave the wife equal rights with her husband, nowhere is held to give rise to such a cause of action as is herein sought to be asserted. We decline to establish a contrary rule based solely upon analogy, and thus open an entirely new field of litigation. We are not concerned with the wisdom of any legislation which might do this specifically, but we decline to do by analogy that which is not permitted by direct enactment."

2. Cases to this effect are:

Nickel v. Hardware Mutual Casualty Co., (Wis.-1955) 70 N.W.2d 205; Giggey v. Gallagher Transportation Co., (Colo.-1937) 72 P.2d 1100; Eschenback v. Benjamin, (Minn.-1935) 263 N.W. 154; Also see Restatement of the Law of Torts, Section 695 and 27 Am.Jur. 114.

of authority in this country. 23 A.L.R.2d 1378; Restatement of the Law of Torts, Section 695;[3] 27 Am. Jur. 114.[4]

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3. This Section provides:

"SECTION 695. ACTION BY WIFE FOR HARM CAUSED BY TORT AGAINST HUSBAND.

"A married woman is not entitled to recover from one who, by his tortious conduct against her husband has become liable to him for illness or other bodily harm, for harm thereby caused to any of her marital interests or for any expense incurred in providing medical treatment for her husband.

"Comment:

"A. Although a husband is entitled to recover for the loss of his wife's services and society and any expense which he incurs as a result of illness or bodily harm caused to her by the tortious conduct of another, a wife is not entitled to a recovery under similar circumstances. The wife is not, nor has she ever been, entitled to the services of her husband. Moreover, she is not deprived of the support to which she is entitled by any tort committed against him. The husband is still legally bound to provide support for her, and the tort-feasor is liable to the husband for any loss of earning power which he may suffer. This the husband himself may recover, and were his wife permitted to recover for the loss of support, a double recovery would result. The wife has a similar interest in the society and sexual relations with her husband as he has in such relations with her. However, the law has not recognized her right to recover against one who has caused harm to such interests by conduct which is not intended to harm them. One who has negligently injured the husband, or has intentionally caused him harm, by conduct directed toward him personally rather than toward the wife's interest is not liable to the wife."

4. This authority states:

"Whatever right a wife may have by virtue of statutes removing her common law disabilities to recover for loss of consortium of her husband as a result of injuries inflicted by a third person, does not extend to loss of consortium caused by a mere negligent injury inflicted upon the husband. At least, in the absence of any statute expressly conferring it, a wife, even though able to sue and be sued as a femme sole, has no right or cause of action, as a general rule, for loss of consortium due to injuries negligently inflicted on her husband. She has no such cause of action even under a statute preserving to her all rights of action growing out of violation of her personal rights. Her loss of consortium resulting from negligence is too remote and indirect to permit her to recover therefor, and hence, it is distinguishable from loss of consortium resulting directly from a wrongful act, as where her

But the plaintiff urges that these holdings are unconstitutional and must be overruled in that they violate the equal protection of the laws provision of the Fourteenth Amendment to the United States Constitution by giving the husband this cause of action or right and withholding the same from the wife.

There is no question that the legislature of a state may grant the wife this cause of action which was not recognized at common law.[5] Therefore, those cases recognizing this right in a state and basing the recognition on legislation granting this right to a wife are not in point here and will not be discussed because the Oklahoma Supreme Court has held that no legislation in Oklahoma has given the wife this right. The plaintiff, however, cites certain cases in which the wife has been afforded a cause of action for loss of consortium without the foundation of state legislation. One case involved the District of Columbia where the Federal Courts of the District have seen fit to recognize this right in the wife as the domestic law of the District of Columbia. *Hitaffer* v. *Argonne Co.*, 183 F.2d 811, cert. denied 340 U.S. 852, 71 S.Ct. 80, 95 L.Ed. 324. A careful reading of this case results in the conclusion that the foundation of this decision was a determination by the Court of domestic policy or law in and for the District of Columbia based on female emancipation and not the command of the Fourteenth Amendment to the United States Constitution.

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husband is wrongfully enticed, seduced, or forced away from her. Furthermore, damages to which the husband is entitled, in a suit for his injuries sustained through another's negligence, are supposed to be full compensation for his injuries in which compensation his wife has a benefit, with the consequence that if the wife is permitted a separate recovery for her loss of consortium resulting from such injuries, there is, in effect, a double recovery for the same matter."

5. The Oklahoma Legislature has not seen fit to enact such legislation since the Howard decision, supra, in 1949.

Two other cases cited are not appellate decisions. In *Clem* v. *Brown*, 207 N.E.2d 398 (1965), a Court of Common Pleas in Ohio decided that the wife should have this right in Ohio. The basis of this decision was the command of the equal protection clause of the Fourteenth Amendment[6]. The case of *Owen* v. *Illinois Baking Corporation* was before the United States District Court for the Western District of Michigan, Southern Division. This case is unreported, the Court not seeing fit to submit the same for publication in Federal Supplement. This decision recognizes the right of a wife to a cause of action for loss of consortium, cites *Hitaffer*, supra, and states that, "to grant a husband the right to sue on this right while denying the wife access to the courts in the assertion of this same right is too clearly a violation of Fourteenth Amendment equal protection guarantees to require citation of authority." Thus, this decision is based on the right in the wife being required by the equal protection clause of the Fourteenth Amendment when such right is granted to the husband. But no authority is cited for this conclusion except *Hitaffer*, supra, which as stated above was not based on the Fourteenth Amendment but rather on an interpretation of the result of female emancipation in the District of Columbia[7].

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6. But the reasoning of the Court is not persuasive, for example:

> "I call attention to the due process clause only because it has lately been invoked to free convicts from responsibility for proven crimes even where the successful appellant has been one with an unsullied and well established general reputation for open thuggery or long continued criminal activity. Consequently, I must conclude that the protection of the 14th Amendment is no less available to Ohio's virtuous wives or to those without virtue for that matter."

7. Hitaffer provides:

> "It is therefore the opinion of this court that in light of the existing law of this jurisdiction, in light of the specious and fallacious reasoning of those cases from other jurisdictions

In the face of the Oklahoma decisions in Howard and Nelson, supra, the decision of our Circuit in Criqui, supra, and the weight of authority on this point in this country, 23 A.L.R.2d 1378, this Court is unable and is unwilling to usurp legislative prerogatives and create a new right in Oklahoma where none has previously existed.

Moreover, for the equal protection clause of the Fourteenth Amendment to be violated the classification involved must amount to an invidious discrimination and be without reasonable basis. *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *Morey* v. *Doud*, 354 U.S. 457, 77 S.Ct. 1344, I L.Ed.2d 1485 (1957). Merely because a husband has a cause of action for loss of consortium it does not automatically follow that the wife must also have one. There must be invidious discrimination and an unreasonable classification and the entire spectrum of the marriage relationship and the basic differences and the different rights and responsibilities existing as between the spouses must be given consideration as they are all brought into play. As these differing rights and responsibilities vary among the states and are the subject of state legislative determination and control, it seems logical that the loss of consortium problem as presented here on behalf of the wife is one for state legislative action and not judicial action.

Nor can it be said in the light of the overall marriage relationship, the basic differences between the spouses and the different rights and responsibilities as between the spouses that invidious discrimination and an unreasonable classification is inherent in allowing the hus-

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which have decided the question, and in light of the demonstratable desirability of the rule under the circumstances, a wife has a cause of action for loss of consortium due to a negligent injury to her husband."

band to recover for loss of consortium and recognize no such cause of action in the wife. See the recent case of *Krohn* v. *Richardson-Merrill, Inc.*, (Tenn.-1966) 406 S.W. 2d 166.

It is, therefore, concluded that a state may afford the husband a cause of action for loss of consortium and not afford such a cause of action to the wife and that such is consistent with the equal protection clause of the Federal Constitution. Such is not an invidious discrimination and the classification has a reasonable basis under the circumstances.

Thus, this diversity action is governed by the law of Oklahoma, Oklahoma has not given the wife a cause of action for loss of consortium and this condition does not offend the Federal Constitution even though such a cause of action is given the husband. It follows that the Complaint of the plaintiff fails to state a claim upon which relief may be granted and the same must be dismissed on the Motions of the defendants. This determination makes it unnecessary to treat with the second issue raised herein by the defendants regarding the effect of the provisions of the Oklahoma Workmen's Compensation Law which provide that its benefits are exclusive as to an injured employee and his spouse.

The Complaint of the plaintiff is dismissed.

Dated this 24 day of February, 1967.

/s/ Fred Daugherty
United States District Judge

Judgment Entered In Civil Docket on Feb. 24, 1967.

/s/ Adelaide Holston
Deputy

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY 1967 TERM

REBA LUNOW,

Appellant,

vs.

FAIRCHANCE LUMBER COMPANY, a corporation; ROCKWELL - STANDARD CORPORATION, a corporation; UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation; ALLEN & HOSHALL, a co-partnership, Composed of Lorin B. Allen and Robert H. Hoshall,

Appellees.

No. 9400

(Filed February 9, 1968)

Appeal from the United States District Court for the Western District of Oklahoma

Leslie L. Conner (James M. Little and Leslie L. Conner, Jr. with him on brief) for Appellant.

Jerome E. Hemry for Appellee Rockwell-Standard Corporation.

Clayton B. Pierce (Lynn J. Bullis with him on brief) for Appellee Allen & Hoshall.

Edgar Fenton (Elliott C. Fenton with him on brief) for Appellees Fairchance Lumber Company and United States Fidelity and Guaranty Company.

Before MURRAH, Chief Judge, BROWN* and HICKEY, Circuit Judges. MURRAH, Chief Judge

*Chief Judge for the Fifth Circuit sitting by designation.

This appellant-wife asserts a right of action against each and all of the appellees for loss of consortium by reason of negligent harm to her husband while in the course of his employment in Oklahoma. The injuries and resulting disability are compensable under the Oklahoma Workmen's Compensation Act. The husband, William Henry Lunow, is being duly paid and his employer is not involved in this action. The action is against appellees as third party tort feasors.

It seems to be conceded that in harmony with general law Oklahoma gives a common law right of action for loss of consortium in favor of a husband but withholds it from the wife. See Howard v. Verdigris Valley Electric Co-Op, 207 P.2d 784; And see also Criqui v. Blaw-Knox Corporation, et al., 318 F.2d 811; Anno. 23 A.L.R.2d 1378; Restatement of Torts §695. This discrimination is said to work a deprivation of equal protection of the laws and a denial of due process of law and to compel a right of action in the wife equivalent to that of the husband in the same or similar circumstances. The motion to dismiss on stipulated facts is two-fold: (1) The Workmen's Compensation benefits provided and paid to the injured husband are exclusive and in place of all common law liability of all of the appellees. The husband does not, therefore, have a right of action in the same circumstances, hence no constitutional right is involved. (2) Oklahoma may, consistently with due process and equal protection of the laws, afford a husband a remedy for loss of consortium while denying it to the wife.

The trial court dismissed the action on the latter ground and did not reach the former. We think the first defense is foremost and decisive, for if a statutory interpretation obviates the necessity for deciding a constitu-

tional issue, we are bound to pursue that course. See Alma Motor Co. v. Timken Co., 329 U.S. 129, 136, and cases cited. And, if, as we think, the judgment of the court can be sustained by statutory interpretation, it should be affirmed even though the trial judge chose the constitutional ground for his decision. And see Kanatser v. Chrysler Corp., 199 F.2d 610; Texaco, Inc. v. Holsinger, 336 F.2d 230.

The pertinent facts are that appellee Rockwell-Standard Corporation, a manufacturer of airplanes in Oklahoma County, Oklahoma, contracted with appellee Fairchance Lumber Company to construct an addition to its plant building according to plans and specifications prepared by appellee Allen & Hoshall. The contract required Fairchance to secure and maintain Workmen's Compensation for its employees, and Fairchance secured such insurance covering workmen on the construction job from appellee United States Fidelity and Guaranty Company. Fairchance subcontracted a part of its contract to the Western Steel Erection Company and required Western Steel to provide Workmen's Compensation to its employees. The husband was injured in the course of his employment with Western Steel and, as we have seen, is now being paid Workmen's Compensation.

Section 11 of the Oklahoma Workmen's Compensation Law expressly provides that an independent contractor shall be liable for Workmen's Compensation due to his direct employees or the employees of any subcontractor. And, the principal employer is also liable in a manner specified for compensation due all direct employees, employees of an independent contractor, subcontractor or other employees engaged in the principal employer's business. This same section also provides that

any person entitled to compensation shall have the right to recover same directly from his immediate employer, the independent contractor or intermediate contractor. And, if the principal employer fails to require compliance with the law by his independent contractor, an employee may proceed against the principal employer without regard to liability of any independent, intermediate or other contractor. Section 12 of the Act provides that the liability prescribed in section 11 shall be "exclusive and in place of all other liability of the employer * * * at common law or otherwise for * * * injury, loss of services * * * to the employee, spouse * * * or any other person * * *."

We are convinced that the liability imposed upon Rockwell and Fairchance by the Workmen's Compensation law is exclusive of all common law liability to either the husband or wife, hence there can be no unconstitutional discrimination between them.

As an independent contractor, Fairchance was, by force of Section 11, at all times liable for compensation due the employees of its subcontractor Western Erection, including Lunow. In the circumstances of this case it was manifestly secondarily liable, hence immune from any common law liability whatsoever.

We have read the Oklahoma decisions to liberally construe Sections 11 and 12 also to immunize a "principal employer" such as Rockwell of all tort liability for any injury occurring to an employee of its independent contractor or a subcontractor in the course of his employment, provided the work being performed is an integral part of or necessarily connected with the business of the principal employer. See Burk v. Cities Service Oil Company of Delaware, 266 F.2d 433, and Oklahoma cases cited there; see also Thomas v. Farnsworth-Chambers Co., 286 F.2d 270; Skelly Oil Co. v. District Court, 401 P.2d 526.

Construing federal law of similar text, we have said that the liability of the United States under §757(b) of the Federal Employees' Compensation Act, 5 U.S.C. 751 et seq. is exclusive of any liability of an employer under the Act to a husband for the loss of his wife's consortium. See Underwood v. United States, 207 F.2d 862; see also United States v. Browning, 359 F.2d 937. We thus expressly declined to follow Hitaffer v. Argonne Co., 183 F.2d 811, relied upon here by appellant. And, that case has since been expressly overruled. See Smithers and Company, Inc. v. Coles, 242 F.2d 220. We are thus confident that Rockwell and Fairchance are immune from the common law liability asserted here.

As the Workmen's Compensation carrier for Fairchance, appellee United States Fidelity & Guaranty Company undertook to pay any losses incurred within the coverage of the policy. As to that, its liability is exactly commensurate with that of its insured. Indeed, the Oklahoma court has emphatically said that "An insurance carrier may under the Workmen's Compensation Law, make the same defenses as are available to the employer and may not be held liable where the employer is not liable." Van Zant v. State Insurance Fund, 223 P.2d 111; and see Board of County Commissioners of Adair County v. Ragg, Adm'x, 147 P.2d 157.

Appellees Allen & Hoshall are alleged to have committed numerous and specific acts of negligence contributing to the husband's injuries. But, as architects employed by Rockwell, they were the agents of their employer, i.e. see 6 C.J.S. Architects, §7. And, it seems to be alleged and conceded that the alleged negligent acts were performed in the course of their employment. Any acts of negligence were, therefore, directly attributable to Rockwell which we have held to be immune from the asserted liability.

The judgment is affirmed.

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SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1411

REBA LUNOW,
Petitioner,

VERSUS

FAIRCHANCE LUMBER COMPANY, a Corporation; ROCKWELL-STANDARD CORPORATION, a Corporation; UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation; ALLEN & HOSHALL, a Co-Partnership, Composed of Lorin B. Allen and Robert H. Hoshall,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1968

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-0030

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1411

REBA LUNOW,
Petitioner,

VERSUS

FAIRCHANCE LUMBER COMPANY, a Corporation; ROCKWELL-STANDARD CORPORATION, a Corporation; UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation; ALLEN & HOSHALL, a Co-Partnership, Composed of Lorin B. Allen and Robert H. Hoshall,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OKLAHOMA STATUTES INVOLVED

Title 85 O.S. 1961, Sections 1-176. (Oklahoma Workman's Compensation Act.)

STATEMENT OF THE CASE

Petitioner commenced an action in the United States District Court for the Western District of Oklahoma invoking the jurisdiction of the Court on the ground of diversity of citizenship between petitioner, a citizen of Oklahoma, and respondents, citizens of different states.

Respondents pleaded in defense that the employment in which the injury to petitioner's husband was sustained was construction work subject to the exclusive jurisdiction of the Oklahoma Workman's Compensation Act, which abrogated all rights of action for damages which might otherwise accrue to all persons, including petitioner herein, under specific terms of the Statute, and the further defense that by decisions of the Supreme Court of Oklahoma referred to in the opinions of the District Court and the Circuit Court of Appeals, that no right of action existed in a wife for loss of consortium due to injuries to her husband.

There was no dispute as to the nature of the employment and operation being carried on in which petitioner's husband was employed at the time of the accidental injury, or that he was receiving compensation under the schedules of the Oklahoma Workman's Compensation Act.

A stipulation of the parties of twenty pages, including exhibits determining all factual matters as to the operation being carried on by respondents and the nature of the employment, was filed and was the basis of the findings of the District Court and the Court of Appeals in the opinions. Such stipulation appears in the record in this Court (Tr. 2).

The District Court filed its memorandum opinion dismissing the action on the ground that no invidious discrimination existed between husband and wife by reason of the decisions of the Supreme Court of Oklahoma, denying a wife a right of action for loss of consortium caused by injuries to the husband (Appendix A 1 to Petition).

The District Court found it unnecessary to pass on the question of whether such a right of action was denied to

both husband and wife by reason of the exclusive provisions of the Oklahoma Workman's Compensation Law, applying to both husband and wife.

The Court of Appeals for the Tenth Circuit, affirming the judgment of the District Court in dismissing the action, held that it was unnecessary to pass on the constitutional question for the reason that all claims arising out of the accident were governed by the exclusive operation of the Oklahoma Workman's Compensation Act, which made the right to the benefits of the compensation exclusive of all other rights of all parties, including both spouses, and that it was the duty of the court to decide the case upon non-constitutional grounds, where such non-constitutional grounds existed as in the case at bar (Appendix B to Petition, page A 10, 389 F.2d 212).

Petitioner contends, however, that the Court of Appeals was without authority to affirm the judgment of the District Court or to pass upon any issues raised below and before the Court in the record on appeal, and to affirm the dismissal upon any ground other than that passed upon by the District Court.

ARGUMENT AND AUTHORITY

Circuit Court of Appeals Properly Affirmed Judgment of District Court on Non-Constitutional Grounds Presented by the Record

In *Robert W. Jaffke, Petitioner* v. *William C. Dunham, Trustee,* 352 U.S. 280, 77 Sup.Ct. 307, 1 L.Ed.2d 314, it was held:

> "A successful party in the District Court may sustain its judgment on any ground that finds support in the record. If the District Court was in error in striking an admissible affidavit, a cross-appeal was not a prerequisite for the Court of Appeals to rule on the admissibility of the affidavit, and finding it admissible, to find that it afforded evidence in support of the District Court judgment. U. S. v. American Railway Express Company, 265 U. S. 425, 435-436, 44 S.Ct. 560, 563-564, 68 L.Ed. 1087; Langness v. Green, 282 U. S. 581, 583, 539, 51 S.Ct., 243, 246, 75 L.Ed. 520. Since the Court of Appeals did not consider the admissibility and weight of the affidavit, we remand to the Court of Appeals for its consideration of those issues. The claim in this case is that relevant, admissible evidence established a constructive trust. Whether it did so or not is a question of Illinois Law. The Court of Appeals, in the view it took of the case before it, did not reach this local question. On remand, that question too must be considered by the Court of Appeals.
>
> "Where the decision below is correct, it must be affirmed by the Appellate Court, though the lower tribunal gives a wrong reason for its action." *J. E. Riley Inv. Co.* v. *Commissioner of Internal Revenue,* 311 U.S. 55, 61 S.Ct. 95, 85 L.Ed. 36.

In *Alma Motor Co.* v. *Timken-Detroit Axle Company*, 329 U.S. 129, 67 Sup.Ct. 231, 91 L.Ed. 128, this Court stated in its opinion:

> "This Court has said repeatedly that it ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable. This is true even though the question is properly presented by the record. If two questions are raised, one of non-constitutional and the other of constitutional nature, and the decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided (Citing Authorities).
>
> "This same rule should guide the lower Courts as well as this one. We believe that the structure of the problems before the Circuit Court of Appeals required the application of the rule to this case."

The Circuit Court of Appeals stated in its opinion, in the case at bar (Appendix B, page A 10).

> "The trial court dismissed the action on the latter ground" (constitutional grounds) "and did not reach the former" (Exclusive Rights and Liabilities under Oklahoma Workmen's Compensation Act.)
>
> "We think the first defense is foremost and decisive, for if a statutory interpretation obviates the necessity for deciding a constitutional issue, we are bound to pursue that course. See Alma Motor Co. v. Timken Company, supra, 329 U.S. 129-136, and cases cited. And, if, as we think, the judgment of the Court can be sustained by statutory interpretation, it should be affirmed even though the trial judge chose the constitutional ground for his decision."

The statement of the case in the memorandum opinion of the District Court and opinion of the Court of Appeals,

relating to the work being performed by respondents, shows that all of the respondents were performing some service in the conduct of a business and employment subject to the Oklahoma Workman's Compensation Act.

The statute involved is Title 85 O.S. 1961, Sec. 12, which provides:

> "The liability prescribed by the last preceding section shall be exclusive and in place of all other liability of the employer and any of his employees, at common law or otherwise, for such injury, loss of services or death, to the employee, spouse, personal representative, parents, dependents, or any other person, except that if any employer has failed to secure the payment of compensation for his injured employees as provided in this act, then an injured employee or his legal representative if death results from the injury may maintain an action in the Courts for damages on account of such injury, * * *."

It is stated on page 21 of the petition:

> "The Oklahoma Workman's Compensation Act was passed at a time when an action for loss of consortium was not granted to a woman for negligent injuries by third persons to her spouse. The Oklahoma Workman's Compensation has abrogated certain rights of the employee. The Court of Appeals, Tenth Circuit, has decided that even if the petitioner has a right to an action for loss of consortium the Workman's Compensation Law of Oklahoma has abrogated this right. This we say is error."

As stated in the opinion of the Circuit Court of Appeals, it seems to be conceded that the Supreme Court of Oklahoma has held that a wife has no cause of action for

damages resulting from negligent injury of her husband by another. The decision of the Supreme Court of Oklahoma to this effect is *Howard* v. *Verdigris Valley Electric Co-operative, Inc.*, 201 Okla. 504, 207 P.2d 784 (1949).

At the time of this decision the statute, Title 85 O.S. Sec. 12 read:

> "Liability prescribed by the last preceding section shall be exclusive except that if an employer has failed to secure the payment of compensation for his injured employee as provided by this act, then an injured employee or his legal representative if death results from the injury may maintain an action in the Courts for damages on account of such injury. * * *."

House Bill No. 312, Session Laws of Oklahoma 1951 (carried forward as Sec. 12, Title 85 O.S. 1961), amended this section to insert after the words "shall be exclusive" and before the words "except that if an employer has failed to secure the payment of compensation" the words "and in place of all other liability of the employer and any of his employees, at common law or otherwise, for such injury, loss of services or death to the employee, spouse, personal representative, parents, dependents, or any other person," thus making clearer and more definite, the legislative intent to make the liability of the employer under the Oklahoma Workman's Compensation Act complete and exclusive, and as stated by the Court of Appeals "that the Workman's Compensation Law is exclusive of all common law liability to either husband or wife, hence there can be no unconstitutional discrimination between them."

CONCLUSION

It is respectfully submitted that for the reasons stated and on the authorities cited, the petition for a Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit should be denied.

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